APPEAL NO. 023070
FILED JANUARY 14, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing was held on November 1, 2002. The hearing officer determined that the appellant/cross-respondent (claimant herein) did not sustain an injury in the course and scope of his employment, and consequently, did not have disability. The hearing officer also concluded that had the claimant's injury been compensable the respondent/cross-appellant (carrier herein) would not have been relieved of liability on the basis of horseplay being a producing cause of the claimant's injury. The claimant appeals, contending that his injury did take place in the course and scope of his employment. The carrier responds that the hearing officer correctly found that the claimant was not in the course and scope of his employment at the time of his injury. The carrier also cross-appeals, arguing that the hearing officer erred in not finding that the claimant was engaged in horseplay at the time of his injury.

DECISION

Finding sufficient evidence to support the decision of the hearing officer and no reversible error in the record, we affirm the decision and order of the hearing officer.

Many of the relevant facts of the case are not in dispute. It was, for instance, undisputed that on _____, the claimant was employed as a laborer on a construction site doing general construction work. The claimant testified that on this date he was reassigned from working on constructing a firewall to handing ceiling tiles to another employee who was hanging the ceiling tiles while standing on stilts. The claimant stated that the employee he was working with told him that working on stilts paid an extra $1.00 per hour. The claimant further testified that on his lunch break he spoke to his supervisor, Mr. M, about whether he could learn to walk on stilts and earn extra money. According to the claimant, Mr. M told him that if he practiced and became proficient walking on the stilts that he could earn more money. The claimant testified that Mr. M helped him onto the stilts and he began walking around on them. It is undisputed that the claimant fell and injured his left wrist and right elbow. The claimant later sought medical treatment and x-rays revealed that the claimant had suffered fractures.

Mr. M testified and gave a somewhat different account of the events of _____. Mr. M stated that the claimant did approach him about learning to walk on the stilts and Mr. M agrees that he told the claimant he could earn more money if he learned to walk on them. Mr. M stated that the claimant was a good worker and he felt he was agile enough to learn to use the stilts. Mr. M further stated that it would have benefited the employer as well as the claimant if the claimant could have learned to use the stilts. However, Mr. M testified that he told the claimant to practice using the stilts at home and that he could take the stilts home to do so. Mr. M stated that the claimant

went ahead against his wishes and put on the stilts himself. Mr. M claims that he told the claimant if he was going to try the stilts at work to only try them inside and not to go outside. Mr. M testified that it was dangerous to use the stilts outdoors and that they were never used outside in construction work. Mr. M contends that the claimant walked outside with the stilts. Mr. M also stated that he went outside and that Mr. M and others told the claimant to get off the stilts before and during the time the claimant fell and was injured.

The claimant provided a witness statement from Mr. R corroborating his version of events on _____. The carrier introduced testimony from Mr. D and other witness statements, which tended to corroborate Mr. M's version of events.

The hearing officer found that the claimant was not in the course and scope of his employment when he was injured because the claimant was acting against the express wishes of the employer when he went outside wearing the stilts. The claimant argues on appeal that his learning to use the stilts benefits his employer and therefore he was in the course and scope of his employment. The claimant argues that had he acted against the wishes of his employer he would have been fired for doing so, but that this did not happen.

The evidence is undisputed that the claimant's learning to use the stilts furthered the affairs of the employer. However, we believe the decision of the hearing officer is affirmable. Generally the violation of an employer's instructions by an employee will not prevent that employee from recovering workers' compensation benefits if the instructions relate merely to the manner of doing work. However, a violation of instructions which are intended to limit the scope of employment will prevent an award of compensation benefits. Maryland Casualty Co. v. Brown, 115 S.W.2d 394 (Tex. 1938) (hereinafter Brown); *see also* Brown v. Forum Insurance Company, 507 S.W.2d 576 (Tex. Civ. App.-Dallas 1974, no writ history); Travelers Insurance Company v. Burden, 94 F.2d 880 (5th Cir.-Tex. 1937). In Brown the claimant was hired to solicit sales of automobiles, but was prohibited by the employer from taking any cars belonging to the employer into Mexico. The claimant was injured while soliciting sales of automobiles in Mexico and the insurer argued that the violation of the claimant's explicit orders prevented the claimant from receiving workers' compensation benefits. The Supreme Court held that the instruction not to travel to Mexico was an instruction that limited the scope of the claimant's employment. We find the employer's instruction in the present case not to use the stilts outside to be an analogous instruction that limited the scope of the claimant's employment.

We understand that the claimant denies that Mr. M instructed him not to go outdoors wearing stilts. Section 410.165(a) provides that the contested case hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as of the weight and credibility that is to be given the evidence. It was for the hearing officer, as trier of fact, to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701, 702 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe

all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.); Aetna Insurance Co. v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied). Applying this standard as well as the holding in Brown, we find no basis to reverse the hearing officer's determination that the claimant was not in the course and scope of his employment at the time of his injury.

Nor do we find any basis to reverse the hearing officer's determination that horseplay was not a producing cause of the claimant's injury. The hearing officer is charged to determine the question of fact of whether horseplay is a producing cause of the injury. Texas Workers' Compensation Commission Appeal No. 93013, decided February 16, 1993. The hearing officer based her factual determination that the claimant was not engaged in horseplay on Mr. M's testimony that the claimant's learning to use the stilts would have benefited the employer. When reviewing a hearing officer's decision for factual sufficiency of the evidence we should reverse such decision only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986).

Finally, with no compensable injury found, there is no loss upon which to find disability. By definition disability depends upon a compensable injury. *See* Section 401.011 (16).

The decision and order of the hearing officer are affirmed.

The true corporate name of the insurance carrier is **WAUSAU UNDERWRITERS INSURANCE COMPANY** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Gary L. Kilgore
Appeals Judge

CONCUR:

_____
Daniel R. Barry
Appeals Judge

_____
Thomas A. Knapp
Appeals Judge